THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SOMERSET COMMUNICATIONS GROUP, LLC, Plaintiff, v. WALL TO WALL ADVERTISING, INC., *et al.*, Defendants.	CASE NO. C13-2084-JCC ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE PLAINTIFF'S SECURITIES FRAUD CLAIMS

This matter comes before the Court on Defendants' Motion for Summary Judgment (Dkt. No. 51). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the Motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Somerset Communications Group, LLC ("Somerset") sues Defendants Wall to Wall Advertising, Inc. ("W2W"), Donald and Andrea MacCord, Shannon and Tracey Doyle, and S.D. Doyle, Ltd. for securities fraud in connection with Somerset's purchase of shares of Fourpoints Holding, LLC ("Fourpoints"). (Amended Complaint, Dkt. No. 24.) Donald MacCord ("MacCord") was the sole shareholder and President of W2W, and the Chief Executive Officer of Fourpoints. (*Id*. at ¶ 1.3.) Shannon Doyle ("Doyle") was the Chief Financial Officer

of Fourpoints. (*Id*. at ¶ 1.4.) Fourpoints was formed by W2W, Lubin Outdoor, LLC ("Lubin"), and Fourpoints Investors ("FP Investors") for the purpose of holding and operating Fourpoints Communications, LLC, a company that built and operated digital billboards on Native American Trust Properties. (*Id*. at ¶ 3.2–3.3.) Plaintiff alleges that Fourpoints was initially funded through a $5.5 million capital investment by FP Investors (a/k/a DH Capital), a $1.5 million investment by W2W (a/k/a MacCord Partners), and a $1.1 million investment by Lubin, with the promise of an additional $6.5 million investment from FP Investors. (*Id.* at ¶ 3.4.) Under Fourpoints' operating agreement, the consent of all manager members (which included FP Investors and Lubin) was required prior to the sale of any units of stock. (*Id.* at ¶ 3.52.)

According to Plaintiff, in May or June of 2009, MacCord approached William Moore, a social acquaintance, with an offer to purchase a five percent stake in Fourpoints for $2 million, from W2W (who would assign its shares). (*Id.* at ¶ 3.17.) The Amended Complaint states that over the next six months, MacCord and Doyle aggressively courted Moore to purchase the stock. During this time, MacCord and Doyle made numerous statements to Moore and sent him five different documents between June 2009 and February 2010 detailing, *inter alia*, Fourpoints' business plans, existing signs, the investment opportunity, 2009 operational results and projections, and year-end actual operational results. (*Id.* at ¶¶ 3.19; 3.30; 3.41; 3.44; 3.54.) Each of these documents, Plaintiff alleges, indicated that Fourpoints had a steady income stream and plans for aggressive expansion. (*Id*. at 3.31; 3.45.) Specifically, these documents allegedly indicated, as late as autumn 2009, that Fourpoints had significant and ongoing revenue from two signs in California (the "Pala Signs"), and that FP Investors would be investing an additional $6 million. (*Id*. at ¶¶ 3.12; 3.28; 3.41; 3.45.) According to the Amended Complaint, neither of these statements was true: the Pala signs were either "terminated" or "turned off" due to local land use regulations *before or in* June 2009 (*id*. at ¶ 3.11) and by late July 2009, Fourpoints was insolvent and FP Investors had indicated that no more investment funds would be forthcoming (*id*. at ¶ 3.12; 3.13). Plaintiff alleges that MacCord and Doyle failed to mention in any

communication that Fourpoints was functionally insolvent, falsely stated revenue figures, and concealed that FP Investors had retracted their investment commitment. (*Id*. at ¶¶ 3.49.)

Allegedly lacking knowledge of Fourpoints' true condition, in November 2009, Moore formed Somerset as an entity through which to purchase shares of Fourpoints from W2W. (*Id*. at ¶ 3.50.) Plaintiff states that in the preceding month, MacCord and Doyle had stated that MacCord wished to sell W2W's shares of Fourpoints to Somerset in order to generate capital for three lucrative investment ventures. (*Id.* at ¶ 3:47.) In reality, the Amended Complaint maintains, MacCord and Doyle sought and ultimately used Somerset's investment to keep Fourpoints afloat despite its then-undisclosed financial troubles. (*Id*. at ¶ 3.48.) Between December 2009 and August 2010, Somerset made nineteen purchases of Fourpoints stock from W2W, investing $2,028,000 in return for a 757.16 units of common stock. (*Id*. at ¶ 3.57.)

The Amended Complaint states that MacCord and Doyle informed Somerset that the other managing partners, Lubin and FP Investors, had consented to each individual sale of shares, as was required by Fourpoints' operating agreement. (*Id*.) However, the Amended Complaint alleges that in reality, neither of these two partners was informed of the sale, and either MacCord or Doyle forged the consent forms for several of the sales. (*Id* at ¶3:53.) MacCord and Doyle then allegedly used Somerset's investment not to fund new ventures, as had been promised, but rather to pay Fourpoints' operating expenses and interest on the loan from FP Investors, all without informing Somerset. (*Id*. at ¶ 3.55.) Somerset allegedly did not learn of Fourpoints' financial troubles until Somerset was informed that MacCord had been dismissed by Fourpoints' other shareholders in November 2010. (*Id*. at ¶ 3.73.) Around this time, Somerset was also informed by Fourpoints and FP Investors that FP Investors had not consented to any of W2W's assignments/sales of Fourpoints units to Somerset, that the consent forms had been forged, and that Fourpoints believed Somerset to have no membership interest in the company. (*Id*. at ¶ 3.74; 3.75.)

Somerset brought six claims for securities fraud under federal law (Section 10b of the

Securities Exchange Act of 1934/Rule 10b-5) and state law (Washington Securities Act) arising from the misrepresentations and omissions MacCord and Doyle allegedly made before and during the period in which Somerset invested in Fourpoints. (Amended Complaint, Dkt. No. 24, § IV.) Specifically, Somerset brings Cause of Action One, alleging that Defendants falsely represented Fourpoints' assets and revenues, especially regarding the "Pala Indian Tribe deal" (*id*. at ¶ 4.3); Cause of Action Two, alleging that Defendants fraudulently omitted the fact that Fourpoints was "essentially insolvent" on repeated occasions (*id*. at ¶ 4.10); Cause of Action Three, alleging that Defendants misrepresented the percentage of Fourpoints shares that Somerset was obtaining (*id*. at ¶ 4.16); Cause of Action Four, alleging that Defendants fraudulently omitted Lubin's reduction of its interest in Fourpoints and sale of its common units to MacCord and W2W at a price much lower (forty percent) than the price W2W was then offering to Somerset (*id.* at ¶ 4.22); Cause of Action Five, alleging that Defendants fraudulently omitted Fourpoints' forbearance agreement deferring its interest payment to FP Investors (*id*. at ¶ 4.28); and Cause of Action Six, alleging that Defendants forged FP Investors' and Lubin's signatures on consent forms for the assignment/sale of units to Somerset (*id*. at ¶ 4.34).

Before the Court is Defendants' Motion for Summary Judgment re Plaintiff's Securities Fraud Claims (Dkt. No. 51). For the following reasons, the Court finds that Defendants are not entitled to judgment as a matter of law at this stage, and denies Defendants' Motion.

II. DISCUSSION

A. Legal Standards

1. *Federal Securities Fraud Claims*

To ultimately prove its Rule 10b-5 securities fraud claims, Somerset must establish (1) a material misrepresentation or omission by Defendants; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance on the misrepresentation or omission; (5) economic loss; and (6) loss causation. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-342 (2005). Information is material when

there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the *reasonable* investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (emphasis added).

2. *Washington Securities Fraud Claims*

To ultimately prove its claims under the Washington Securities Act (RCW 21.20 *et seq.*), Somerset must establish that Defendants "made material misrepresentations or omissions about the security, and [Somerset] relied on those misrepresentations or omissions." *Stewart v. Estate of Steiner*, 122 Wash. App. 258, 264 (2004). Intent to defraud is not required under the state statute. *Go2Net, Inc. v. FreeYellow.com, Inc.*, 126 Wash. App 769, 775 (2005). Under the WSA, "reliance must be reasonable under the surrounding circumstances." *FutureSelect Portfolio Management, Inc. v. Tremont Group Holdings, Inc.*, 175 Wash. App. 840, 868 (2013).

3. *Summary Judgment Standard*

However, because Defendants move for summary judgment, Plaintiff need not *prove* the above elements at this stage of the litigation. Instead, Somerset's claims must be evaluated under the permissive summary judgment standard. "Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party [here, Plaintiff], there are no genuine issues of material fact and the moving party [here, Defendants] is [are] entitled to judgment as a matter of law. If, as to any given material fact, evidence produced by the moving party . . . conflicts with evidence produced by the nonmoving party . . . , [the court] must assume the truth of the evidence set forth by the nonmoving party with respect to that material fact." *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). In resolving summary judgment motions, courts are not at liberty to weigh the evidence, make credibility determinations, or draw inferences from the facts that are adverse to the non-moving party. As the Supreme Court has held, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whe[n] he is ruling on a motion for summary judgment."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

In this case, there exist disputes of material fact on all of Plaintiff's causes of action, making summary judgment inappropriate.

B. Plaintiff's Claims

1. *First Cause of Action – Securities Fraud for False Assets and Revenue*

Plaintiff alleges that in marketing Fourpoints securities, Defendants falsely represented Fourpoints' assets and revenues, (such as by claiming non-existent revenues from the Pala Signs and rapid growth in California and Arizona), in documents such as the Investment Opportunity, Business Plan, Operational Results/Projection Summary for 2009-2010, and Fourpoints Operational Results 2009. (Amended Complaint, Dkt. No. 24 at 17.) In their Motion for Summary Judgment, Defendants seek dismissal of this first cause of action, asserting that: (1) the Pala signs "were always represented as nothing more than a potential future source of revenue" (Dkt. No. 51 at 7); (2) "[t]he projections at issue are undeniably forward-looking representations and, as such, are not actionable except in the most extreme circumstances" due to the PSLRA's safe harbor (*id.*); (3) "Plaintiff cannot show reasonable reliance where it had full access to the books and records, was given . . . accounting of the signs that were actually up and running, and had ample opportunity to test the likelihood of revenue from future Pala Signs through its own due diligence" (*id.* at 9); (4) "Plaintiff knew (or, at the very least, should have known) that the Pala Signs were not existing revenue sources and might not ever be" (*id.* at 10); and (5) "Plaintiff cannot establish scienter" (*id.* at 11).

However, Plaintiff's Response establishes disputes of fact with regard to these points, when the evidence is viewed and inferences are made in the light most favorable to Plaintiff.

With regard to Defendants' first point, that the Pala Signs were always represented as future contingencies, Plaintiff presents contrary evidence that "Doyle admitted in deposition that he included Pala Sign revenues in the 'Operational Results/ Projection Summary 2009' of October 27th, 2009 which reflected actual revenue results at least through August 2009 [citing

Doyle Deposition, Dkt. No. 60-1 at 175 [145?]] . . . even though [Doyle] knew the signs were turned off in June [citing July 10, 2009 Emails, Dkt. No. 60-4] and the lease obligations released in September [citing Doyle Deposition, Dkt. No. 60-1 at 231]." (Plaintiff's Response, Dkt. No. 57 at 12.) Plaintiff also presents evidence that "$336,000 of monthly Pala Sign revenue is explicitly included in the 'Pro Forma Revenue 2010' given to Somerset." (*Id.* (citing Somerset PPM, Dkt. No. 52-4 at 1837-40).)

With regard to Defendants' second point, that the statements at issue were forward looking statements protected by the PSLRA's safe harbor, Plaintiff presents contrary evidence that the October 2009 Operational Results/ Projection Summary 2009 and the February 2010 Operational Results 2009 documents provided to Somerset by Doyle "included *actual* revenue results at least through August 2009," rather than forward looking projections, and were presented to Somerset by the time Defendants allegedly knew that the Pala signs presented no serious revenue prospects. (Plaintiff's Response, Dkt. No. 57 at 13 (citing Doyle Deposition, Dkt. No. 60-1 at 145; Expert Witness Report of Robert Wagner, Dkt. No. 60-13; and Ex. 6 to Moore Declaration, Dkt. No. 58).) Further, Plaintiff claims that Defendants did not include any cautionary language or risk disclosures in the October-December 2009 Projections or in the Pro Forma 2010, preventing Defendants from invoking the "bespeaks caution" doctrine/ safe harbor. (Plaintiff's Response, Dkt. No. 57 at 13.)

With regard to Defendants' third and fourth points regarding reasonable reliance and Plaintiff's alleged knowledge of the inoperability of the Pala Signs, Plaintiff presents evidence that it reasonably relied upon Defendants' false financial statements in investing $2,028,000 in Fourpoints. For instance, Somerset's PPM, given to the secondary investors solicited by Somerset, allegedly reflected the revenue numbers supplied by Doyle. (*See* Plaintiff's Response, Dkt. No. 57 at 14.) Further, to invoke lack of due diligence as a defense to fraud, Defendants must establish that Somerset "intentionally refused to investigate 'in disregard of a risk known to [it] or so obvious that [it] must be taken to have been aware of it, and so great as to make it

highly probable that harm would follow.'" *Dupuy v. Dupuy*, 551 F.2d 1005, 1020 (5th Cir. 1977). Defendants have not presented undisputed evidence establishing, as a matter of law, any reckless lack of due diligence on the part of Plaintiff.

With regard to Defendants' fifth point, that Plaintiff cannot establish scienter, Plaintiff explains that summary judgment may be granted on the issue of scienter only when "there is no rational basis in the record for concluding that any of the challenged statements was made with the requisite scienter." *In re Software Toolworks, Inc.*, 38 F.3d 1078, 1088 (9th Cir. 1994). This is not true in the instant case, where, Plaintiff alleges, "only two weeks before Doyle gave the 'Operational Results/ Projection Summary 2009' to Somerset showing Fourpoints was profitable, he produced a truthful version internally to Fourpoints Investors showing Fourpoints continued to lose money and would lose $1.2 Million by the end of the year." (Plaintiff's Response, Dkt. No. 57 at 17 (citing Ex. 7 of Goss Declaration, Dkt. No. 60).)

In sum, Plaintiff states that "[t]he evidence is undeniable that Defendants never warned Somerset that Fourpoints was continuing to lose money through 2009 in any way that would adequately caution Somerset from relying upon the multi-million dollar profits Defendants projected for 2010." (Plaintiff's Response, Dkt. No. 57 at 14.) In the eyes of this Court, Plaintiff has presented sufficient evidence supporting this assertion to preclude summary judgment with regard to Plaintiff's first cause of action.

2. *Second Cause of Action: Omission/ Concealment of Fourpoints' Insolvency*

Plaintiff alleges that "[i]n the offer and sale of [Fourpoints] common units to Somerset in interstate commerce, W2W, MacCord and Doyle failed to disclose that at the time of each sale [Fourpoints] did not have sufficient revenue to meet its liabilities, and was essentially insolvent." (Amended Complaint, Dkt. No. 24 at 19.) Defendants' response is that "Fourpoints was not insolvent" and that even if it was insolvent, this omission was not fraudulent because "Somerset had the opportunity to (and did) independently evaluate Fourpoints' financial condition prior to investing." (Defendants' Motion, Dkt. No. 51 at 12.)

However, Plaintiff presents evidence sufficient to establish disputes of material fact with regard to both of the above defenses. With regard to the issue of Fourpoints' objective insolvency, Plaintiff points to Doyle's own December 2010 signed declaration, averring that "existing advertising revenue was not sufficient to maintain the ongoing business," and that Fourpoints "simply did not have a large enough revenue base from its modest sign plant to afford [interest and preferred dividend] payments." (Plaintiff's Response, Dkt. No. 57 at 21 (citing Doyle Declaration, Dkt. No. 60-3 at 3).) Additionally, Plaintiff presents evidence indicating that a month before Somerset purchased its first tranche of Fourpoints securities, Fourpoints entered into a forbearance agreement with its existing investors (Fourpoints Investors) because it could not afford its interest payments. (Plaintiff's Response, Dkt. No. 57 at 21 (citing Forbearance Agreement Letter, Dkt. No. 60-9 at 2).) Lastly, Plaintiff claims that Fourpoints sold nearly all its assets to Total Outdoor for less than it owed. (*Id.* (citing Moore Declaration, Dkt. No. 58 at ¶ 20).) This evidence creates genuine issues of material fact with regard to Fourpoints' actual, objective insolvency.

Plaintiff also presents challenges to Defendants' claim that Somerset was at fault for failing to discover any objective insolvency during its due diligence. As Plaintiff explains, and as is highly relevant to all of Plaintiff's omission-based causes of action, Rule 10b-5 obligates Defendants to disclose information when such information is necessary "to make . . . statements made, in the light of the circumstances under which they were made, not misleading." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321 (2011) (citing 17 C.F.R. § 240.10b-5(b)). Thus, "when Defendants have reported that Fourpoints is profitable, they have an affirmative duty to disclose that it cannot pay its debts, and they cannot shift the burden to Somerset to divine Fourpoints' dire condition." (Plaintiff's Response, Dkt. No. 57 at 22.)

The Court finds these arguments preclude Defendants from securing judgment on this second cause of action at this stage.

3. *Third Cause of Action- Securities Fraud for False Percentage of Units*

In the Amended Complaint, Plaintiff alleged that MacCord and Doyle fraudulently misled Somerset as to the percentage of Fourpoints shares it was purchasing. (Amended Complaint, Dkt. No. 24 at 19-20.) However, "Somerset withdraws its 3rd Cause of Action for misrepresentation of the percentage of ownership resulting from Somerset's purchase of Fourpoints units." (Plaintiff's Response, Dkt. No. 57 at 2 n.1.) Hence, the Court dismisses this Third Cause of Action, mooting Defendants' summary judgment arguments on this point.

4. *Fourth Cause of Action – Omission of Sale of Shares by Lubin Outdoor*

Plaintiff claims that "[i]n the offer and sale of [Fourpoints] common units to Somerset in interstate commerce, W2W, MacCord and Doyle failed to disclose that at the same time [as Somerset was purchasing these shares,] Lubin Outdoor was reducing its interest in [Fourpoints] by selling common units of [Fourpoints] to MacCord and W2W at a valuation nearly 40% lower than [] offered [to] Somerset by W2W, MacCord and Doyle" which was "critical information material to Somerset's decision to purchase common units of [Fourpoints] from W2W, MacCord, and Doyle." (Amended Complaint, Dkt. No. 24, at 20-21.) Defendants request summary judgment on this cause of action because "Plaintiff can point to no authority requiring a securities seller to inform the buyer as to what *other* owners may or may not be doing with their interests." (Defendants' Motion, Dkt. No. 51 at 14.)

However, Defendants do concede that there is an affirmative duty to speak under Washington law, at such times when the facts "are so vital and material to a transaction that if known by one party and not the other, the agreement would be voidable" (*id.* at 15 (citing *Kaas v. Privette*, 12 Wash. App. 142, 149 (1974))), and under federal law, when information is required to "make the statement made, in light of the circumstances under which they were made, not misleading" (*id.* (citing 17 C.F.R. § 240.10b-5)).

Plaintiff has presented evidence sufficient for the Court to conclude that there is at least a material issue of fact with regard to whether such an affirmative duty to speak existed with regard to the sale of shares by Lubin Outdoor. For instance, Plaintiff states that by providing the

Investment Opportunity and Business Plan Overview "to Somerset identifying Lubin Outdoor as one of only three owners and investors in Fourpoints with a 10% stake, Defendants assumed the affirmative duty to disclose to Somerset that Lubin Outdoor was reducing its ownership." (Plaintiff's Response, Dkt. No. 57 at 22.) Such a claim is not without merit, given the 10b-5 omission standard that Defendants themselves concede. *See Matrixx*, 131 S. Ct. at 1321. Further, Plaintiff has established materiality of this omission sufficient to preclude summary judgment – "divesting by one of three owners when Fourpoints is supposedly profitable and projected to generate multi-million dollar profits in the next year raises significant questions about the reliability of Defendants' financial statements." (Plaintiff's Response, Dkt. No. 57 at 22.) Additionally, Plaintiff alleges, "that Lubin Outdoor was selling at a third lower price only heightens the doubt of Defendants' financial projections." (*Id.*) In light of these arguments, the Court cannot grant summary judgment to Defendants on this cause of action.

5. *Fifth Cause of Action – Omission of Forbearance Agreement*

Plaintiff alleges that in the offer and sale of Fourpoints units to Somerset, "W2W, MacCord and Doyle failed to disclose that [Fourpoints] was operating under a forbearance agreement deferring its interest and distribution payments to FP Investors." (Amended Complaint, Dkt. No. 24 at 21.) Defendants argue that this "claim is baseless, however, because (i) Somerset knew of DH Capital's loan to Fourpoints, (ii) Defendants did not misstate anything (and had no affirmative duty to speak if not asked), and (iii) the fact of the forbearance of a known debt is immaterial because, if anything, it's good news to future investors." (Defendants' Motion, Dkt. No. 51 at 16.) However, Plaintiff responds with facts and arguments of law that demonstrate genuine disputes with regard to these defenses.

Defendants' first point, that Somerset knew of DH Capital's loan to Fourpoints, is immaterial because it is Somerset's knowledge of Fourpoints' *forbearance* of said loan that is material. And Plaintiff has supplied the Court with evidence sufficient to create a dispute of fact as to whether Somerset had knowledge of the forbearance agreement. As Plaintiff states,

"Defendants misrepresent the Fourpoints Projection Summary 2010. While the document does list two $220,000 interest payments to Fourpoints Investors, it does not state that Fourpoints cannot or will not make these payments. Defendants cannot identify one document actually supporting disclosure [of the forbearance agreement], because there are none. The forbearance agreement was never disclosed to Somerset." (Plaintiff's Response, Dkt. No. 57 at 22-23 (citing December 3, 2009 Email, Dkt. No. 52-11; Moore Declaration, Dkt. No. 58 at ¶16).)

As to Defendants' second and third points, Plaintiff explains that "[w]hen Defendants provided financial statements to Somerset stating that Fourpoints was profitable, they assumed the affirmative duty to disclose that Fourpoints could not make its debt payments and entered the forbearance agreement." (*Id.* (citing 17 C.F.R. § 240.10b-5; *Matrixx*, 131 S. Ct. at 1321).) The Court finds sufficient support in the record and governing case law to deny summary judgment on this cause of action.

6. *Sixth Cause of Action- Securities Fraud for Forgery*

The last of Plaintiff's causes of action on which Defendants seek summary judgment is Somerset's allegation that in the offer and sale of Fourpoints shares to Somerset, "W2W, MacCord, and/or Doyle forged the signatures on consents to the Assignment of Units agreements between W2W and Somerset." (Amended Complaint, Dkt. No. 24 at 22.) Somerset claims that after purchasing the last of the Fourpoints units from W2W, William Moore received a letter from the Fourpoints Board (after MacCord was terminated) informing Plaintiff that the other owners of Fourpoints shares had not consented to the assignment of W2W's Fourpoints shares to Somerset, as was required by the operating agreement binding on W2W, DH Capital, and Lubin Outdoor. (Moore Declaration, Dkt. No. 58 at ¶15 (citing Dec. 16, 2010 letter and Dec. 19, 2010 email, Moore Declaration, Dkt. No. 58-7).) This, Plaintiff claims, rendered the shares it held "null and void" and left Somerset with nothing after its $2,028,000 investment. (*Id.*)

Defendants respond by arguing that they "(i) had the requisite consents, and (ii) even if this allegation is true . . . Somerset lacks standing to pursue this claim, because they cannot show

any damages." (Defendants' Motion, Dkt. No. 51 at 18.)

However, Plaintiff offers external evidence that calls into question Defendants' possession of the requisite consents. As Plaintiff states in the Response, "Fourpoints Investors unequivocally states that it never had knowledge of or consented to any sales of Fourpoints units from December 2009 through August 2010 (the Somerset purchases), and that MacCord used consents from prior approved sales." (Plaintiff's Response, Dkt. No. 57 at 18 (citing Declaration of Martin Friedman, Dkt. No. 60-11 at 8).) Plaintiff adds that "MacCord declared this was true under penalty of perjury in the prior litigation with Fourpoints." (*Id.* (citing Declaration of Donald MacCord, Dkt. No. 60-2 at 8).)

Further, Plaintiff points out that Defendants' lack of damages argument is unavailing because "[b]ut for the forged consents, Somerset would have received valid Fourpoints units. That the Assignments of Units lacked consent made them null and void and therefore, worthless. . . . Defendants' claim that Somerset was not injured when the $2,028,000 that Somerset invested bought nothing is preposterous." (Plaintiff's Response, Dkt. No. 57 at 19.)

In light of this evidence, summary judgment on the forgery claim is inappropriate.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment (Dkt. No. 51) is DENIED.

DATED this 18th day of May 2015.

John C. Coughenour
UNITED STATES DISTRICT JUDGE